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No. 83-413

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

CONTINENTAL AIRLINES, INC.,
Petitioner,

v.

FRED ZIMMERMAN, Trustee of
Ludwig Honold Manufacturing Co., Debtor,
Respondent.

WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RESPONSE TO PETITION FOR CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

Does the Bankruptcy Court have jurisdiction to determine a dispute between the Trustee for the Debtor and the defendant, arising out of a written contract which contains a provision in which the Debtor and defendant agreed to submit to arbitration disputes arising out of said contract?

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is reported at 712 F.2d 55 (3d Cir. 1983). The opinion of the United States Bankruptcy Court for the Eastern District of Pennsylvania is reported at 22 B.R. 436 (Bankr. E.D. Pa. 1982).

JURISDICTION

Respondent adopts Petitioner's statement of "Jurisdiction".

STATUTORY PROVISION INVOLVED

Respondent adopts Petitioner's statement of "Statutory Provisions Involved".

COUNTERSTATEMENT OF THE CASE

On November 11, 1981, an involuntary petition in bankruptcy was filed against Ludwig Honold Manufacturing Company ("Ludwig Honold"). The case was converted to a Chapter 11 proceeding and subsequently Fred Zimmerman, the plaintiff herein, was appointed as Trustee of the Debtor.

Included among the assets of the Debtor's estate was an account receivable against Continental Airlines, Inc. ("Continental"). The account receivable arose out of a contract entered into between Ludwig Honold and Continental pursuant to which Continental agreed to purchase from Ludwig Honold four "plane mate" vehicles (the "Contract").

Prior to the delivery of the third "plane mate" vehicle by Ludwig Honold to Continental, Continental, in various documents, agreed to waive any rights it may have had under the Contract to assert liquidated damages for late delivery of any of the "plane mates". Subsequently, Ludwig Honold completed its obligation under the Contract and demanded the Contract balance. Despite its representation to the contrary, Continental refused to pay the contract balance, asserting a right to claim liquidated damages.

On April 20, 1983, Fred Zimmerman (the "Trustee'), commenced an adversary proceeding against Continental in the Bankruptcy Court seeking judgment against Continental for all sums due and owing under the Contract. Continental did not file an Answer to the Complaint but rather filed an Application for Stay Pending Arbitration. The Contract between Ludwig Honold and Continental contained a provision requiring the arbitration of all

controversies arising under the Contract. Continental relied on this provision and on the Federal Arbitration Act, 9 U.S.C. Section 3, in its Application for Stay Pending Arbitration. The Trustee filed a response to Continental's Application for Stay, admitting the existence of the arbitration provision but denying that the arbitration provision contained in the Contract was binding on the Trustee. The Trustee further denied that the Federal Arbitration Act was applicable to the bankruptcy proceeding.

After argument and the submission of briefs, Bankruptcy Judge Goldhaber issued an Order and accompanying Opinion denying the Application of Continental. The Court reasoned that Congress enacted 28 U.S.C. Section 1471, which broadens the jurisdiction of the Bankruptcy Court, with the intention of insuring prompt administration of bankrupt estates. The effective and prompt resolution and

administration of issues relating to and arising out of a bankruptcy proceeding were controlling factors in the Bankruptcy Judge's decision to deny the stay of proceedings pending arbitration.

Continental filed a timely Notice of Appeal to the District Court. Thereafter, counsel for both parties executed a Stipulation for Direct Appeal to the United States Court of Appeals for the Third Circuit. In an Opinion filed July 11, 1983, the Court of Appeals affirmed the Order of the Bankruptcy Court.

The Court of Appeals analyzed the Congressional policy supporting the broad jurisdictional grant for bankruptcy courts contained in the Bankruptcy Reform Act of 1978 and noted the special place held by bankruptcy proceedings in the Federal judicial system. The Court concluded:

> Therefore, because of the importance of bankruptcy proceedings in general, and the need for the expeditious resolution of bankruptcy matters in particular, we hold that the intentions of Congress will be better realized if the Bankruptcy Reform Act is ready to impliedly modify the Arbitration Act.
>
> 712 F.2d at 59 (App. at A-10)

The Court of Appeals accordingly held that the Bankruptcy Court had the discretionary power to deny a stay pending arbitration, and no abuse of discretion occurred.

REASONS FOR DENYING CERTIORARI

I. The Institution Of Bankruptcy Proceedings By Petitioner Has Rendered Moot The Issue Presently Before This Court.

The question presented for review concerns the applicability of a forum selection clause contained in a commercial contract to a trustee in bankruptcy. The issue arose when the Trustee of Ludwig Honold sought to collect an account receivable from Continental

by instituting an action in the Bankruptcy Court. Subsequent to the filing of the Writ of Certiorari, Continental filed its own voluntary petition in bankruptcy pursuant to Chapter 11 of the Bankruptcy Code, 11 U.S.C. Upon the filing of this petition, an automatic stay was imposed by Section 362 of the Bankruptcy Code prohibiting any action to collect a pre-petition indebtedness owed by Continental. It is manifest that because the Trustee is enjoined from pursuing his suit against Continental, the question concerning the proper forum for that suit is moot.

II. The Decision of the Third Circuit Court Of Appeals Does Not Conflict With An Opinion Of Any Other Circuit Court Of Appeals.

One of the factors to be considered by this Court when determining whether to grant a writ of certiorari is the existence of a conflict among the decisions of the Circuit

Courts of Appeals. See U.S. Sup.Ct. Rule 17, 28 U.S.C.A. (Supp. 1983); Rice v. Sioux City Memorial Park Cemetery, Inc., 75 Sup.Ct. 614, 619-20 (1955); Layne & Bowler Corporation v. Western Well Works, Inc., 43 Sup.Ct. 422 (1923). There has been no reported decision from any Circuit Court of Appeals which conflicts with the holding of the Third Circuit below.

Continental argues that certiorari should be granted because of a conflicting decision of a Bankruptcy Appellate Panel of the Ninth Circuit. Such a holding would significantly and imporperly expand the scope and number of cases presented for review. Moreover, the holding of the Bankruptcy Appellate Panel in In re Morgan, 28 BR 3 (Bankr. 9th Cir. 1983), appeal docketed, No. 83-1818 (9th Cir., March 22, 1983) is not in conflict with the decision of the Third Circuit. In Morgan, the Court held that a debtor-in-possessio

and not a trustee, was bound by an arbitration provision contained in a pre-petition contract where the debtor-in-possession sought to enforce rights under the contract. The Court further found that the debtor-in-possession was bound by the doctrine of res judicata. Id. at 5.

The decision of the Third Circuit is in harmony with recent decisions of the district courts and the bankruptcy courts. In In re Braniff Airways, Inc., 3 BLR 83,157 (Bankr. N.D. Tex. 1983), the Court held that the Congressional policy of giving the Chapter 11 debtor an unhampered chance for reorganization as evidenced by the grant to bankruptcy courts of exclusive jurisdiction over a bankruptcy case in 28 U.S.C. Section 1471, the removal provisions of 28 U.S.C. Section 1478, and the automatic stay provisions in Bankruptcy Code Section 362, override the Arbitration Act particularly where resolution of the issues will determine which creditors are entitled to share in the estate and in what order of

priority. See also, In re Sterling Mining Company, Inc., 21 BR 66 (Bankr. W.D. Va. 1982); In re Cross Electric Co., 9 BR 408 (Bankr. W.D. Va. 1981) (holding that the United States Arbitration Act is not applicable to bankruptcy proceedings).

In Coar v. Brown, 29 BR 806 (D.C. N.D. Ill. 1983), the District Court was called upon to resolve the interplay between the Bankruptcy Code and the United States Arbitration Act. Although the Court recognized the strong federal policy favoring arbitration of disputes, the interests represented by the trustee in bankruptcy were paramount and the Court therefore refused to stay the proceeding pending arbitration.

Continental cites two decisions of lower courts as being in conflict with the decision of the Third Circuit. The first cited case, In re Hart Ski Manufacturing Co., 18 BR 154 (Bankr. D. Minn.), aff'd, 22 BR 763 (D. Minn. 1982), is inapplicable because the Court was

not faced with and did not decide the issue of the competing policies which support the Federal Arbitration Act and the Bankruptcy Code. The second case, Barber-Greene Co. v. Zeco Co., 17 BR 248 (Bankr. D. Minn. 1982), supports the decision of the Third Circuit below in that the Court recognized that it was not bound by the Federal Arbitration Act but rather had discretion as to whether to assume jurisdiction over the controversy.

Prior to the enactment of the Bankruptcy Code, the jurisdiction of the bankruptcy courts was greatly restricted. However, decisions under the former Bankruptcy Act were in accord with the decision of the Third Circuit below. See, In re F & T Contractors, Inc., 649 F.2d 1229, (6th Cir. 1981); Johnson v. England, 356 F.2d 44 (9th Cir.) cert. den., 384 U.S. 961 (1966); Allegaret v. Perot, 548 F.2d 432 (2d Cir.), cert. den., 432 U.S. 910 (1977).

In other appropriate circumstances, courts have also refused to compel arbitration under an arbitration clause. In Wilko v. Swan, 346 U.S. 427 (1953), this Court held that an action under the Securities Act of 1933 would not be stayed pending arbitration despite the existence of an arbitration clause and the United States Arbitration Act. In American Safety Equipment Corporation v. J. P. Maguire & Co., 391 F.2d 821 (2d Cir. 1968), the Court held that an action for a delcaratory judgment to void a license agreement as violative of the Sherman Anti-Trust Act would not be stayed, despite the existence of an arbitration clause and the United States Arbitration Act.

Finally, the decision below is not in conflict in principle with a Second Circuit decision decided under the Bankruptcy Code, as contended by Continental. See, In re Petrusch, 667 F.2d 297 (2nd Cir. 1981), cert. den., 456 U.S. 974 (1982). The Petrusch case is

distinguishable on its facts and therefore inapplicable to the case at bar. At issue in Petrusch was an important substantive right, namely the right to picket. Id. at 298.

Congress protected this substantive right by withdrawing from the jurisdictional powers of any United States court the power to issue injunctions restraining picketing. See 29 U.S.C.A. Sec. 104 (1973). The Debtor, in Petrusch, sought an Order from the Bankruptcy Court enjoining the picketing of his premises as a violation of the automatic stay provision of the Bankruptcy Code. The Circuit Court held that neither the legislative history nor the provisions of the Bankruptcy Code could be construed so as to repeal this fundamental substantive right. In re Petrusch, 667 F.2d at 299-300. No such substantive right is at issue in the instant proceeding.

CONCLUSION

For the reasons stated, a writ of certiorari should not issue to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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